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UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 02-2138

KELVIN J. HURDLE,
Plaintiff – Appellant

Versus

COMMONWEALTH OF VIRGINIA, DEPARTMENT OF ENVIRONMENTAL QUALITY
Defendant - Appellee

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Robert E. Payne, District Judge.
(CA-01-259-3)

Submitted: December 16.2002
Decided: December 19. 2002
[Entered: December 19, 2002]

Before LUTTIG, MICHEAL, and MOTZ, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Kelvin J. Hurdle, Appellant Pro Se. Martha Murphey Parrish, Assistant Attorney General, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36 (c).

PER CURIAM:

Kelvin J. Hurdle appeals the district court's order dismissing his racial discrimination complaint filed in this employment discrimination action. We have reviewed the record and find no reversible error. Accordingly, we affirm on the reasoning of the district court. Hurdle v. Virginia, No. CA-01-259 (E. D. VA. Sept 25, 2002). We deny Hurdle's motion for appointment of counsel and dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

KELVIN J. HURDLE

Plaintiff,

v. CIVIL Action No. 3:01cv259

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF ENVIRONMENTAL QUALITY,

Defendant.

ORDER
[Entered: January 5, 2001]

For the reason set forth in the accompanying Memorandum Opinion, it is hereby ORDERED that:

[1] the defendant's Motion for Summary Judgment is granted;

[2] Count IV in its entirety, that part of Count I asserting retaliation in respect of opposition to post-employment benefits, and those parts of Count III asserting the intentional infliction of emotional distress and conspiracy, having been abandoned in open Court, are DISMISSED with prejudice;

[3] The remainder of Counts I and III (not dismissed under paragraph [2] above] and the federal claims in Count II are dismissed without prejudice for lack of jurisdiction;

[4] Alternatively, those Counts referred to in paragraph

[3] above are DISMISSED with prejudice by virtue of the doctrine of collateral estoppel;

[5] The state claims in Count II are DISMISSED without prejudice; and

[5] This action is DISMISSED.

This Order may be appealed by the plaintiff. Any appeal from this decision must be taken by filing a written notice of appeal with the Clerk of the Court within thirty [30] days of the date of entry hereof. Failure to file a timely notice of appeal may result in the loss of the right to appeal.

The clerk is directed to send a copy of this Order to the plaintiff and counsel for the defendant.

It is so Ordered.

/s/ Robert E. Payne
Robert E. Payne
United States District Judge

Richmond, Virginia

Date: January 5, 2001

UNITED STATES COURT OF APPEALS
FOR THE FORTH CIRCUIT

FILED
March 11, 2003

No. 02-2138
CA—01-259

KELVIN J. HURDLE

Plaintiff – Appellant

v.

COMMONWEALTH OF VIRGINIA, DEPARTMENT OF ENVIRONMENTAL QUALITY

Defendants – Appellees

On Petition for Rehearing and Rehearing En Banc

Appellant's petition for rehearing and rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
Patricia S. Connor

CLERK

LEGAL AID JUSTICE CENTER
Richmond Office
101 West Broad Street, Suite 111
Richmond, VA 23220

Lynette Woolfolk

(804) 643-1086 or 1-800-496-0365
FAX: [804] 643-2059

October 7, 2002

Kelvin J. Hurdle
5001 Hallmark Court
Richmond, VA 23234

Re: Kelvin J. Hurdle v. Dept. Environmental Quality

Dear Mr. Hurdle:

It was determined that there was insufficient merit for this office to represent you with your employment matter. Your case file is being close.

I have enclosed your original documents that are being returned to you need additional legal services in the future.

Sincerely,

Lynette Woolfolk
Legal Assistant

[Page 110 from transcript of the grievance hearing Hurdle v. DEQ]

* * *

Q Okay. So in that sense he's responsible for quantity, at this time frame 76?
A But if you look back at the performance standards, it doesn't say complete all, send out a letter on every annual report that's assigned for every facility that's assigned to you. It says review and annual report within four hours and meets the technical criteria.

Q So if he was assigned 76 facilities and he only did one, he did it in four hours and did it perfectly, are you telling me that he would have gotten an excellent evaluation?

A Probably not, but it's not the criteria.

Mr. Crowley: That's all I have.

(Line 14-15) **The COMMISSIONER:** <u>There's a flag in every direction.</u>

Ms. Black: That's all I have.

The COMMISSIONER: One question I had, I can't remember what it was now, -- oh, on the four hour business, is it four hours average? In other words is it expected that in some cases he might do an annual report in one hour others might take six, but on average it should be not more that four?

A No, it's not an average that way, it's an average that sometimes it may take you an hour and sometimes it may take you up to four hours, but it should never take you over for hours.

* * *

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Environmental Quality / No. 2001-13

April 3, 2001

The grievant has requested a ruling on whether his November 17, 2000 grievance with the Department of Environmental Quality (DEQ) qualifies for a hearing. In this grievance, the grievant claims that his 2000 performance evaluation is arbitrary, capricious, and retaliatory. For the reasons discussed below, this grievance is consolidated with the grievant's February 14, 2001 grievance (which has automatically qualified for hearing), and both grievances will be heard together by one hearing officer.

FACTS

In September 2000, the grievant received his 1999-2000 performance evaluation with an overall rating of Does Not Meet Expectations. The evaluation consisted of six job elements upon which the grievant's performance was rated. He received a rating of Does Not Meet Expectations in each of the six categories.

On January 16, 2001, the agency terminated the grievant under the Standards of Conduct for alleged poor job performance. On February 14,2001, the

grievant filed a second grievance challenging his performance-based termination as wrongful, unfair, and retaliatory.

This second grievance, which also involves the grievant's September 2000 performance evaluation, has automatically qualified for a hearing. A hearing on this second grievance has not yet been held.

DISCUSSION

This Department has the authority to consolidate grievances on it own accord and does so when consolidation promotes judicial economy and a more comprehensive understanding of the disputed issues. This is such a case. The issue of the grievant's performance is central to both of his grievances. Thus, the factual issues presented by each grievance are significantly intertwined. Indeed, it may be that the first grievance has now been subsumed by the second. In any event, a hearing officer has already been appointed to determine whether the performance-based termination was warranted and appropriate under the circumstances. It is therefore reasonable under the unique circumstances of this case for the hearing officer to review as well the issue of whether the grievant's September 2000 performance evaluation is arbitrary, capricious or retaliatory.

At hearing, with respect to the February 14, 2001 grievance, the agency will have the burden of proving by a preponderance of the evidence, that the February 2001 termination was "warranted and appropriate under the circumstances." The hearing officer may

either uphold, reduce, or rescind the termination. With respect to the November 27, 2000 grievance, the grievant must prove by a preponderance of the evidence that his September 2000 evaluation was arbitrary, capricious, or retaliatory. If the hearing officer so finds, he may direct the agency to redo the September 2000 evaluation on an objective basis related to the performance expectations in the grievant's performance plan. The hearing officer may not substitute his judgment for that of management by ordering that a specific performance rating be given.